IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 21, 2009

STATE OF TENNESSEE v. ANTHONY J. FULMER

Direct Appeal from the Circuit Court for Montgomery County
No. 40700033 John H. Gasaway, III, Judge

No. M2008-01206-CCA-R3-CD - Filed February 26, 2010

Defendant, Anthony John Fulmer, was indicted in count one of the indictment for aggravated rape by vaginal sexual penetration, in count two for aggravated rape by anal sexual penetration, in count three for aggravated rape by vaginal sexual penetration, in count four for aggravated rape by cunnilingus, all Class A felonies, and in count five for aggravated burglary, a Class C felony. Following a jury trial, Defendant was found not guilty of aggravated rape as charged in counts two and four of the indictment. The jury found Defendant guilty of aggravated rape as charged in counts one and three. The trial court granted Defendant's motion for judgment of acquittal as to the aggravated burglary charge. The trial court sentenced Defendant as a Range II, multiple offender, to concurrent sentences of twenty-seven years for his two aggravated rape convictions, for an effective sentence of twenty-seven years. On appeal, Defendant challenges the trial court's instructions to the jury on the requisite mental state for the offense of aggravated rape. After a thorough review, we affirm the convictions and sentences but remand for entry of corrected judgments to reflect that Defendant is classified as a multiple rapist rather than a child rapist as indicated on the forms.

Tenn. R. App. P. Appeal as of Right; Judgments of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the Court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Roger Eric Nell, District Public Defender; Collier W. Goodlett, Assistant Public Defender, Clarksville, Tennessee, for the appellant, Anthony Fulmer.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Arthur F. Bieber, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

We will refer to the minor victim by her initials. Daphne Lee testified that the victim, C.L., was her daughter, and that C.L. was thirteen years old at the time of the offenses. Ms. Lee and the victim lived in a basement apartment on Chestnut Drive in Clarksville. Ms. Lee provided in-home health care for mentally ill patients, and she worked from 10:00 p.m. until 6:00 a.m. Ms. Lee had discussed her work schedule with the victim before accepting the employment, and the victim assured Ms. Lee that she would not mind staying alone at night. Ms. Lee instructed the victim to call either her or 911 if the victim encountered any problems. Ms. Lee stated that the victim walked to her place of employment on July 4, 2006, arriving at approximately 2:50 a.m. Ms. Lee described the victim as "distraught," and she observed blood on the victim's neck. Ms. Lee called 911.

C.L. testified that someone knocked on her front door at approximately 1:00 a.m. on July 4, 2006, and woke her up. The lights in the apartment were off, and it was dark. C.L. said that she did not know why she opened the front door or why she did not telephone her mother. A man, whom C.L. identified at trial as Defendant, told C.L. that Ms. Lee had asked him to check on her. C.L. did not believe him because her mother had never done that before. Defendant told C.L. to go back to bed, and she did. Defendant then asked whether there was a telephone in C.L.'s bedroom, and C.L. responded, "No." Defendant asked when her mother would be home, and C.L. told him at approximately 6:00 a.m. Defendant unplugged C.L.'s illuminated clock so that the only light source in the bedroom was the street light.

C.L. pretended to go to sleep. Defendant began feeling her buttocks, and C.L. asked him what he was doing. Defendant began choking her. He then removed C.L.'s clothes and penetrated her vaginally with his penis on two separate occasions. C.L. stated that Defendant told her, "I am going to f__you so hard." The incident lasted approximately one hour. Afterwards, Defendant asked C.L. if she "would like to watch T.V. and kiss." Defendant told C.L. that he loved her. He then began to cry and told the victim that he was sorry for his conduct. A car drove by the apartment, and Defendant said that he had to leave. He told C.L. that he would "get after" her if C.L. told anyone about the incident. C.L. turned on the bedroom light so Defendant could find his tee shirt. C.L. realized that she had seen Defendant once before when he had mowed her yard. After he left, C.L. heard footsteps in the empty upstairs apartment. C.L. waited approximately one minute and then walked to the house where Ms. Lee was working. C.L. first said that Defendant did not engage in either anal sexual intercourse or cunnilingus and then said she could not remember whether he did.

Chris Goff testified that he owned the house located at 58 Chestnut Drive. The house had been divided into two apartments. Ms. Lee and her daughter lived in the basement apartment, and the main part of the house, which was vacant, was undergoing renovations. A few days before the incident, Defendant approached Mr. Goff and asked for work. Mr. Goff hired Defendant to mow the lawn and assist with painting the unfinished apartment. Mr. Goff furnished Defendant with a key to the upstairs apartment so that Defendant could continue painting in Mr. Goff's absence.

Carolyn Smeltzer testified that she was employed by Our Kids Center as a registered nurse and nurse practitioner in July 2006. Ms. Smeltzer's examination of C.L. revealed two small lacerations on the fossa, bruising on her hymen, and a partial tear in the hymenal tissue. Ms. Smeltzer said that C.L.'s vaginal injuries were consistent with penetration. C.L. also had multiple scratches and bruising on the upper portion of her neck. Ms. Smeltzer took swabs of the labial, vaginal and anal areas, and a blood sample for DNA testing.

Defendant gave a statement to Detective Gregory Beebe with the Clarksville Police Department concerning the incident. The videotape of the interview was played for the jury. In his statement, Defendant at first maintained that he could not remember what happened during the early morning hours of July 4, 2006, because he had been drinking beer and using crack cocaine. Defendant then said that he was painting the upstairs apartment at the victim's residence on the evening of the incident. Defendant acknowledged that he knew that a woman and her daughter lived in the basement apartment. Defendant described the women to Detective Beebe, but he stated that he did not know their names. Defendant said that he knocked on the victim's door and told her that her mother had called him asked Defendant to check on the victim. Defendant admitted that he went to the victim's apartment for the purpose of engaging in sexual relations with the victim. Defendant told Detective Beebe that he vaginally penetrated the victim with his penis, but he denied that he penetrated her anally.

Detective Beebe collected two oral swabs from Defendant at the time Defendant was interviewed. Frank Basile, a forensic scientist for Bode Technology, performed the testing of the samples collected from C.L. Mr. Basile testified that semen was detected on the vaginal, labial, and anal swabs collected by Ms. Smelter. Sarah Shields, a DNA analyst with Bode Technology, tested the samples from C.L. against the sample provided by Defendant. Ms. Shields testified that the DNA samples taken from the victim were consistent with Defendant's DNA profile at a frequency of one in 380 quadrillion people.

II. Jury Instructions

Defendant argues that the trial court erred in instructing the jury that it could find Defendant guilty of the offense of aggravated rape if it found beyond a reasonable doubt that Defendant acted recklessly. Defendant concedes that he did not raise the issue in his motion for new trial, but he asks this Court to review his issue for plain error. The State contends that the trial court's error does not rise to the level of plain error because Defendant has failed to clearly establish what occurred in the trial court or to establish that a substantial right has been affected by any error of the trial court.

Ordinarily, Defendant's issue would be considered waived because the record does not indicate that he objected to the content of the trial court's instruction to the jury after the instructions were provided, *see* Tenn. R. Crim. P. 30(b), and he failed to raise the issue in a motion for new trial. *See* Tenn. R. App. P. 36(a); Tenn. R. App. P. 3(e). "When an issue is raised for the first time on appeal, it is typically waived." *State v. Maddin*, 192 S.W.3d 558, 561 (Tenn. Crim. App. 2005). Therefore, this Court may only review the issue for plain error. *See* Tenn. R. App. P. 36(b) (providing that "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time.)

To recognize the existence of plain error, this Court must find each of the following five factors applicable: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is necessary to do substantial justice. *State v. Smith*, 24 S.W.3d 274, 282 (Tenn. 2000) (adopting the factors first articulated in *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). "[A] complete consideration of all five of the factors is not necessary when it is clear from the record that at least one of them cannot be satisfied." *State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn. 2007) (citing *Smith*, 24 S.W.3d at 283).

We observe initially that Defendant has failed to establish clearly what occurred in the trial court by failing to properly supplement the record on appeal with the trial court's jury instructions in accordance with Rule 24(e) of the Tennessee Rules of Appellate Procedure. Defendant's motion to supplement the record with the jury instructions was granted by this Court on February 9, 2009. We directed "that a supplemental record be prepared, properly bound in accordance with the applicable rules, certified by the clerk of the trial court and then transmitted to this Court within twenty days of the date of [the] order." *See* Tenn. R. App. P. 24(e). We further directed that Defendant "was responsible for ensuring that this supplemental record [was] properly prepared and filed within the time allowed." We glean

from Defendant's brief that he attached an uncertified copy of the trial court's jury instructions to his motion. However, the record is devoid of any indication that Defendant took the steps necessary to ensure a proper record in accordance with Rule 24(e) the Tennessee Rules of Appellate Procedure, and this failure precludes review of Defendant's issue as plain error.

However, even assuming *arguendo* that the trial court erred in instructing the jury with the mental state of reckless with respect to the element of sexual penetration, we conclude that Defendant has failed to establish that consideration of the error is necessary to do substantial justice under the circumstances presented in this case. *See State v. Weltha Womack*, No. E2003-02332-CCA-R3-CD, 2005 WL 17428, at *9 (Tenn. Crim. App., at Knoxville, Jan. 24, 2005), *no perm. to appeal filed* (concluding that when the charged offense is aggravated rape, which involves a nature of conduct crime, it is error for the trial court "to charge the mental state definition of 'reckless' with respect to the element of sexual penetration); *see also State v. Deji A. Ogundiya*, No. M2002-03099-CCA-R3-CD (Tenn. Crim. App. at Nashville, Feb. 19, 2004), *no perm. to appeal filed* (noting that "[g]enerally, only the culpable mental states of 'intentional' and 'knowing' are applicable to nature of conduct crimes).

In the case *sub judice*, the victim initially testified that Defendant did not penetrate her anally, and then she said that she could not remember whether he did or not. The State suggested during closing argument, without objection, that the jury could find that Defendant penetrated the victim anally by mistake before penetrating her vaginally based on the forensic evidence, and that Defendant acted recklessly in committing this charged offense. The State, however, argued that the evidence presented during its case-in-chief supported a finding that Defendant acted intentionally with regard to the other charged offenses.

The jury by its verdict of not guilty clearly rejected the State's argument concerning the charged offense of aggravated rape by anal sexual penetration as charged in count two of the indictment . For a "substantial right" of the defendant to have been effected, the error must have prejudiced the defendant. "In other words, it must have affected the outcome of the trial court proceedings." *Maddin*, 129 S.W.3d at 562 (citing *United States v. Olano*, 507 U.S. 725, 732-37, 113 S. Ct. 1770 (1993); *Adkisson*, 899 S.W.2d at 642).

As for the charged offenses of aggravated rape by vaginal intercourse in counts one and three, we conclude that Defendant was not prejudiced by the jury instructions because there was no evidence presented at trial which would support a jury's finding that Defendant acted recklessly in committing the offenses. *See Maddin*, 129 S.W.3d at 562. Defendant admitted to Detective Beebe that he went to the victim's apartment for the purpose of engaging in sexual conduct, and that he vaginally penetrated the victim. The victim testified

that Defendant told her he was going to engage in sexual intercourse with her, that Defendant vaginally penetrated her twice, and that Defendant apologized for his conduct. Based on the foregoing, we conclude that a substantial right of Defendant's was not affected. We are therefore unable to review this matter as plain error, and this issue is waived.

We note that on the judgment of conviction, Defendant is classified as a child rapist for release eligibility purposes. Defendant, however, should be classified as a multiple rapist with a release eligibility of one hundred percent.

CONCLUSION

After a thorough review, we affirm the convictions and sentences. However, we remand for entry of corrected judgments to reflect that Defendant is classified as a multiple rapist in accordance with Tennessee Code Annotated section 39-13-523(a)(3) and not as a child rapist as indicated on the judgment forms.

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THOMAS T. WOODALL, JUDGE